A

AZMER MUSTAFA

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZAHAR MOHAMED JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPEAL NO: B-05-328-2010]

C

21 MARCH 2014

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Sequence of events - Location of drugs - Whether there were conflicting testimonies - Whether appellant's defence*

D

considered - Whether non-production of material witness gave rise to adverse inference under s. 114(g) Evidence Act 1950 - Whether exhibits tendered were in relation to charge - Whether there was a mix up of exhibits - Whether storekeeper should have been called as witness

E

EVIDENCE: *Adverse inference - Failure to call material witness - Trafficking in dangerous drugs - Key witness - Failure to tender witness statement under s. 112 Criminal Procedure Code - Whether crippled prosecution's case - Whether non-production of witness gave rise to adverse inference - Evidence Act 1950, s. 114(g)*

F

Acting on information received, Chief Inspector Chia Aik Chin ('SP2') and Detective Corporal Govindasamy ('SP4') laid an ambush. The appellant was seen driving a Proton Wira ('the motorcar') accompanied by a woman ('Yana') who sat next to him at the front left seat. When the appellant alighted from the

G

motorcar, he was seen carrying a plastic bag in his right hand and walked towards a row of shophouses. The appellant was subsequently arrested and he was found carrying 2,884g of cannabis, as confirmed by the government chemist ('SP3'). Before proceeding to the police station, SP2 and the police party were

H

taken by the appellant and Yana to their house at Taman Berjaya where 1kg of vegetable matter suspected to be cannabis was seized and three Indonesian males were arrested. During his defence, the appellant submitted that he was asked by a man named Agus to fetch SD2 from Kampung Jawa. The appellant

I

used Agus' car and when he arrived at his destination, the appellant alighted from the motorcar, leaving Yana still seated in the front left seat. He walked towards SD2, who was at that time

waiting in front of a hardware shop. According to the appellant, he did not carry anything in his hands when he alighted from the motorcar. Further, it was testified that after the appellant and Yana were arrested, the police examined the motorcar and found a plastic bag located at the rear seat of the said car. As such, the appellant argued that he had never seen the plastic bag prior to his arrest. In the High Court, the appellant was convicted and sentenced to death for trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952. Hence, this appeal. The issues that arose for consideration were in relation to (i) the non-calling of Yana as a witness; and (ii) the non-calling of the storekeeper since there were gaps in the handling of the exhibits. It was submitted that there was a possibility of a mix up between both the exhibits taken from Kampung Jawa and Taman Berjaya.

Held (allowing appeal; setting aside decision of High Court) Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The appellant raised his defence at the first available opportunity when he mentioned in his cautioned statement that the plastic bag was recovered from the backseat of the motorcar. However, the learned High Court Judge did not consider the defence raised by the appellant in his cautioned statement. This was a non-direction which amounts to a misdirection. A weak or an unreasonable defence must be considered and appreciated judicially. It should not be brushed aside without giving it due consideration. (paras 25, 27 – 29)

(2) SD2 corroborated the appellant's testimony when he gave evidence to the effect that the appellant was not holding anything when he got out of the motorcar. The version advanced by SD2 was contrary to and in contrast to the testimonies of SP2 and SP4. Since there were nagging doubts as to the location of the drugs which were found, Yana's role played a prominent part. Yana was a key witness who saw the whole episode while seated as a front passenger in the motorcar. The prosecution should have tendered Yana's statement to negate all the negative inferences that arose as a result of the cross-examination of the prosecution witnesses. (para 31, 35 & 36)

(3) It is purely a question of fact on whether a particular witness is material or otherwise. What is of importance is to consider whether the material witness is essential to the unfolding of the narratives on which the prosecution's case is based. The prosecution failed to secure Yana's attendance in court and the failure to tender Yana's statement recorded under s. 112 of the Criminal Procedure Code crippled the prosecution's case. Further, the non-production of Yana gave rise to the adverse inference that if she had been called, her evidence would be unfavourable to the prosecution. That being the case, the presumption under s. 114(g) of the Evidence Act 1950 must be invoked against the prosecution. (paras 42, 43, 47 & 48)

(4) The markings of the exhibits by SP2 as identified by him and the signatures of SP2 on the exhibits together with the dates written thereto on the exhibits showed that those were the exhibits in relation to the charge. All these markings showed that the exhibits were the same exhibits seized from the scene of the crime at Kampung Jawa and analysed by SP3. Thus, there was no necessity to call the storekeeper. (paras 57 & 58)

Bahasa Malaysia *Translation Of Headnotes*

Bertindak atas maklumat yang diterima, Ketua Inspektor Chia Aik Chin ('SP2') dan Detektif Korporal Govindasamy ('SP4') telah merancang satu serang hendap. Perayu dilihat memandu sebuah kereta Proton Wira ('motokar') bersama-sama dengan seorang perempuan ('Yana') yang duduk bersebelahan dengan perayu di bahagian hadapan sebelah kiri kereta. Apabila perayu turun dari motokar itu, dia dilihat membawa sebuah beg plastik di tangan kirinya dan berjalan ke arah deretan rumah kedai. Perayu kemudiannya telah ditangkap dan didapati membawa 2,884g kanabis, seperti yang disahkan oleh ahli kimia kerajaan ('SP3'). Sebelum menuju ke balai polis, SP2 dan pihak polis telah dibawa oleh perayu dan Yana ke rumah mereka di Taman Berjaya di mana 1kg bahan tanaman yang disyaki kanabis telah dirampas dan tiga orang lelaki Indonesia ditangkap. Dalam pembelaannya, perayu berhujah bahawa seorang bernama Agus telah meminta perayu untuk membawa SD2 dari Kampung Jawa. Perayu menggunakan kereta Agus dan apabila tiba ke destinasinya, perayu turun dari motokar, meninggalkan Yana yang masih duduk di bahagian

hadapan tempat duduk. Perayu berjalan menuju ke arah SD2, yang pada masa itu menunggu di hadapan sebuah kedai. Menurut perayu, dia tidak membawa apa-apa di tangannya semasa turun dari motokar. Tambahan lagi, adalah dihujahkan bahawa selepas perayu dan Yana ditangkap, polis telah memeriksa motokar dan menjumpai sebuah beg plastik yang terletak di bahagian tempat duduk belakang kereta itu. Oleh itu, perayu berhujah bahawa dia tidak pernah melihat beg plastik tersebut sebelum ditangkap. Di Mahkamah Tinggi, perayu disabitkan dan dihukum mati atas kesalahan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan adalah berkenaan (i) kegagalan memanggil Yana sebagai saksi; dan (ii) kegagalan memanggil penjaga stor memandangkan terdapat jurang dalam pengendalian ekshibit-ekshibit. Adalah dihujahkan bahawa terdapat kemungkinan bahawa ekshibit-ekshibit yang diambil dari Kampung Jawa dan Taman Berjaya bercampur.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Perayu membangkitkan pembelaannya pada peluang yang paling awal apabila dia menyatakan dalam kenyataan amarannya bahawa beg plastik dijumpai di bahagian tempat duduk belakang motokar itu. Walau bagaimanapun, Yang Arif Hakim Mahkamah Tinggi tidak mempertimbangkan pembelaan yang dibangkitkan oleh perayu dalam kenyataan amarannya. Ini adalah suatu ketidakarahan yang berjumlah kepada salah arahan. Pembelaan yang lemah atau tidak munasabah mesti dipertimbangkan dan dinilai secara kehakiman. Ia tidak boleh diasingkan tanpa diberikan pertimbangan yang sepatutnya.

(2) SD2 menyokong keterangan perayu apabila dia memberi keterangan bahawa perayu tidak memegang apa-apa apabila dia keluar dari motokar. Versi yang diberi oleh SD2 adalah bertentangan dengan SP2 dan SP4. Memandangkan terdapat keraguan berkenaan lokasi dadah yang dijumpai, peranan Yana adalah penting. Sebagai seorang penumpang yang duduk di bahagian hadapan motokar, Yana merupakan seorang saksi penting di mana dia telah melihat segala peristiwa yang berlaku. Pihak pendakwaan sepatutnya mengemukakan kenyataan Yana untuk menolak semua inferens yang berbangkit daripada pemeriksaan balas saksi-saksi pendakwaan.

(3) Adalah suatu persoalan fakta sama ada seseorang saksi itu adalah penting atau sebaliknya. Apa yang penting untuk dipertimbangkan adalah sama ada saksi penting adalah penting untuk membuka naratif di mana kes pendakwaan bersandar terhadapnya. Pihak pendakwaan gagal menjamin kehadiran Yana di mahkamah dan kegagalan untuk mengemukakan kenyataannya yang direkodkan di bawah s. 112 Kanun Tatacara Jenayah telah melumpuhkan kes pendakwaan. Tambahan lagi, ketidakhadiran Yana telah membangkitkan anggapan bertentangan di mana jika dia dipanggil, keterangannya tidak akan memihak kepada pihak pendakwaan. Oleh itu, anggapan di bawah s. 114(g) Akta Keterangan 1950 mesti dibangkitkan terhadap pendakwaan.

(4) Penandaan ekshibit-ekshibit oleh SP2 seperti yang dikenal pasti olehnya dan tandatangan SP2 atas ekshibit bersama-sama dengan tarikh yang dicatit di atasnya menunjukkan bahawa ekshibit-ekshibit tersebut adalah berkaitan dengan pertuduhan. Kesemua penandaan ini menunjukkan bahawa ekshibit-ekshibit itu adalah ekshibit sama yang diambil dari tempat kejadian di Kampung Jawa dan dianalisa oleh SP3. Oleh itu, tiada keperluan untuk memanggil penjaga stor.

Case(s) referred to:

Abu Bakar v. Regina [1963] 1 LNS 4 HC ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Ang Kian Chai v. PP & Another Appeal [2012] 1 LNS 389 CA ***(refd)***
Chan Chor Shuh v. PP [2003] 1 CLJ 501 CA ***(refd)***
Er Ah Kiat v. PP [1965] 1 LNS 37 FC ***(refd)***
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 FC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(foll)***
Goh Ah Yew v. PP [1948] 1 LNS 13 HC ***(refd)***
Joseph Bundy [1910] 5 Cr App R 270 ***(refd)***
Liza Ismail v. PP [1997] 2 SLR 454 ***(refd)***
Mohan Singh Lachman Singh v. PP [2002] 3 CLJ 293 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP v. Mohd Fahmi Hamzah [2002] 1 LNS 59 HC ***(refd)***
PP lwn. Muhd Zulkifli Abd Ghani & Satu Lagi [2011] 2 CLJ 772 CA ***(refd)***
PP v. Nordin Awang [2000] 1 LNS 288 HC ***(refd)***
R v. Emmanuel [1998] Crim LR 347 ***(refd)***
Seneviratne v. R [1936] 3 All ER 36 ***(refd)***
Tan Foo Su v. PP [1967] 1 LNS 179 HC ***(refd)***
Teoh Hoe Chye v. PP & Another Case [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), (2)
Evidence Act 1950, s. 114(g)
Immigration Act 1959, s. 6(1)(c)

For the appellant - J Kuldeep Kumar; M/s J Kuldeep Kumar & Co
For the prosecution - Farah Ezlin Yusop Khan; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-26-2003]

Reported by Kumitha Abd Majid

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] Before the High Court at Shah Alam, the appellant was convicted and sentenced to death for trafficking in 2,884g of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") and punishable under s. 39B(2) of the DDA. Aggrieved, the appellant now appeals to this court.

[2] The charge against the appellant was worded in this way:

> Bahawa kamu pada 11 September 2002 jam lebih kurang 5.30 petang di Jalan Teluk, Batu 1, Off Batu 4½ Jalan Kampung Jawa, dalam daerah Klang dalam Negeri Selangor Darul Ehsan, didapati telah memperedar dadah berbahaya iaitu 2,884 gram cannabis dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The Case For The Prosecution

[3] On 11 September 2002 at 5.30pm, acting on information received, Chief Inspector Chia Aik Chin (SP2) accompanied by Detective Corporal Govindasamy a/l Raju (SP4) and other police personnel from the narcotics division of "Ibu Pejabat Kontinjen" ("IPK") Selangor proceeded to the place mentioned in the charge and there, they kept vigil. Both SP2 and SP4 located themselves nearer to shop number 7877 at Jalan Teluk. All the police personnel were in civilian clothes.

[4] At about 6pm, both SP2 and SP4 saw a Proton Wira motorcar bearing registration number WJY 4762 stop in front of shop number 7877. That motorcar was driven by the appellant with a woman passenger who sat next to him. The appellant was seen by both SP2 and SP4 alighting from the said motorcar, carrying in his right hand a plastic bag, and walking towards the row of shophouses. SP2 observed the appellant for about a minute and noticed that the appellant was waiting for someone.

[5] Without further ado, SP2 approached the appellant and SP2 introduced himself as a police officer. Upon hearing this, the appellant tried to escape. SP2 quickly wrapped his arms across the body of the appellant from behind in an attempt to arrest the appellant. A scuffle ensued. In the course of the struggle, the appellant dropped the plastic bag, which he carried, to the ground. The appellant bit the left arm of SP2 but was eventually subdued and arrested with the help of SP4 and the other police personnel.

[6] The plastic bag, which was dropped to the ground by the appellant during the struggle, was retrieved. In the presence of the appellant, SP2 examined the plastic bag with a brand name "Rags Solid Station" (exh. "P10") and found that it contained a "Berita Harian" newspaper package dated 22 August 2002 (exh. "P11") and inside it, SP2 found three compressed dried vegetable matters suspected to be cannabis, which were wrapped in aluminium foils and clear plastics (exhs. "P12", "P13" and "P14"). The woman passenger identified as "Yana" who was said to be the appellant's wife was arrested and together with the appellant and the exhibits, were taken to the police station at IPK Selangor.

[7] Before proceeding to the police station at IPK Selangor, SP2 and the police party were taken, at about 7pm, by the appellant and "Yana" to their house at Taman Berjaya, Klang. There, SP2 seized one kilogram of vegetable matter suspected to be cannabis and arrested three male Indonesians with the assistance of the police party. However, SP4 testified that he did not accompany SP2 to the house at Taman Berjaya, Klang.

[8] At IPK Selangor, SP2 marked the exhibits and initialled them. And on 11 September 2002 at 11.50pm, SP2 brought the exhibits together with the appellant and "Yana" to the police

station at Pandamaran, Klang and handed them to Chief Inspector Che Samsuddin bin Che Yusoff (SP7), the investigating officer of the case.

[9] SP7 also marked the exhibits accordingly.

[10] The material particulars in the evidence of SP4 in relation to what had happened at the scene of the crime corroborated the evidence of SP2.

[11] On 13 September 2002, SP7 sent the exhibits to the police forensic department at Cheras for the purpose of lifting the finger prints on the exhibits. DSP Izanizam bin Salleh (SP5) was unable to lift any fingerprints on the exhibits because the "characteristics" were insufficient for purposes of comparison. In short, SP5 gave a negative report.

[12] Investigations by SP7 revealed that the appellant and "Yana" hailed from Acheh, Indonesia and that the appellant alleged that "Yana" was his wife. Both the appellant and "Yana" had no valid travel documents.

[13] Evidence was led to show that "Yana" was charged and convicted for an offence under s. 6(1)(c) of the Immigration Act 1959 for not being in possession of a valid travel document. Evidence was also led to show that the Proton Wira motorcar was registered in the name of Nor Haidawati bte Abdul Malek and it was leased for RM1,100 per month to Ahmad Rizan bin Abdul Razak who was carrying out a car rental business. Evidence also showed that the said motorcar was rented by a male Malay who came together with the appellant on 5 July 2002. According to SP7, the said motorcar was returned to its registered owner on an unspecified date.

[14] In due course, the government chemist by the name of Halimah bte Abd Rahim (SP3) analysed the exhibits and confirmed that they were cannabis weighing 2,884g, a dangerous drug within the meaning of s. 2 of the DDA.

The Appellant's Defence

[15] The appellant gave his evidence under oath and he also called Lahmat bin Mustafa (SD2) as his witness.

[16] The appellant testified that on 11 September 2002 at about 5.15pm when he was in a house at Bukit Rimau, Taman Berjaya, Jalan Sungai Rasau, Klang, he was asked by a man named "Agus" to fetch SD2 at Batu 4½ Kampung Jawa. The appellant agreed and at 5.20pm of the same day, he proceeded there in Agus's Proton Wira motorcar bearing registration number WJY 4762 accompanied by his wife named "Yana". The appellant drove the said motorcar with "Yana" as a passenger in the front left seat.

[17] Half an hour later, the appellant arrived at his destination. He parked the said motorcar in front of a furniture shop and he alighted leaving "Yana" still seated in the front left seat. He walked towards SD2 who was, at that time, waiting in front of the hardware shop. According to the appellant, he did not carry anything in his hands when he alighted from the said motorcar. All of a sudden, three male individuals, who later turned out to be policemen, arrested him. He testifed to the following facts:

(a) that he did not attempt to run away when he was arrested because he had no opportunity to escape;

(b) that he did not struggle with the three policemen in an attempt to run away;

(c) that he did not bite the left arm of SP2 because after he was arrested, both his hands were handcuffed to the rear;

(d) that when he was arrested, he saw "Yana" still seated in the front left seat of the said motorcar; and

(e) that "Yana" was arrested when she was still in the said motorcar.

[18] He further testified that after he and "Yana" were arrested, the police examined the said motorcar and found a plastic bag (exh. "P10") located at the rear seat of the said motorcar. He said that prior to his arrest, he had never seen the plastic bag (exh. "P10") before. While "Yana" was put in the said motorcar and driven away by a policeman, the appellant was placed in a police car and taken to his house at Bukit Rimau. He did not observe who carried the plastic bag (exh. "P10") that the police found in the said motorcar. In his house, the police arrested three of his friends, namely Nordin, Zulfikar and Hafizal. He said that the police searched his house and he was unsure whether the police found any incriminating articles therein. He did not know whether Nordin, Zulfikar and Hafizal were charged in court or not.

[19] He testified that after his arrest, he gave a cautioned statement to the police. In his cautioned statement, he said that "Agus" stayed with him. When asked, he also said in his cautioned statement that the ganja in the plastic bag (exh. "P10") was found inside the said motorcar.

[20] Under cross-examination, the appellant denied that he carried the plastic bag (exh. "P10") containing three compressed dried vegetable matters suspected to be cannabis. He also denied that before the police arrested him, the police had introduced themselves. He also denied that he tried to run away after the police had introduced themselves. He denied that one of the policemen had wrapped his arms across his body and a scuffle ensued. He denied that in the course of the struggle, he had bitten the left arm of one of the policemen. He denied that the police retrieved the plastic bag (exh. "P10") that fell to the ground during the struggle with him. He denied that the police showed him the contents of the plastic bag (exh. "P10") after his arrest. He also denied that "Yana" got out of the said motorcar and there, she was arrested.

[21] However, he agreed under cross-examination that he did not tell the police about SD2. In re-examination, he advanced a reason for not telling the police about SD2 and that was because the latter was not connected to the case. He reiterated that he told the police that the said motorcar belonged to "Agus" and that SD2 had no connection with the said motorcar at all. He emphasised that SD2 existed but he did not know where SD2 stayed in Malaysia because SD2 had just arrived in Malaysia from Acheh. He too said that he was not certain where SD2 was working.

[22] The testimony of SD2 corroborated the evidence of the appellant to the following effects:

(a) that the appellant did not hold anything in his hand ("tidak memegang apa-apa di dalam tangannya") (p. 135 of the appeal record at jilid 2) when he was arrested; and

(b) that SD2 saw the police recovered a plastic bag (exh. "P10") from the backseat of the said motorcar.

A **Analysis**

[23] Before us, only two issues were advanced. The first issue concerned the non-calling of "Yana", while the second issue pertained to the gaps in the handling of the exhibits by the non-
B calling of the store keeper. We will now consider these two issues *seriatim*.

The First Issue

[24] There were two conflicting versions of what actually
C transpired on the date of the offence as set out in the charge. The prosecution has one version while the defence has another version. Both SP2 and SP4 testified that they saw the appellant carried the plastic bag (exh. "P10") containing the drugs in the right hand when the appellant alighted from the said motorcar and
D walked towards the row of shop houses particularly in the direction of the hardware shop. The appellant denied in his defence that he held the plastic bag (exh. "P10") containing the drugs in his right hand as he alighted from the said motorcar.

E **[25]** The appellant raised his defence at the first available opportunity when he mentioned in his cautioned statement that the plastic bag (exh. "P10") was recovered from the backseat of the said motorcar. It is germane to mention that the appellant's defence as enumerated in the cautioned statement was affirmed by
F SP7 – the investigating officer, during the cross-examination of SP7. In his cross-examination, SP7 was asked the following pertinent questions and the answers elicited from him can be seen at p. 108 of the appeal record at jilid 1:

G S: Setuju kamu ada aturkan percakapan daripada tertuduh di bawah s.37A Akta Dadah Berbahaya pada 19.9.2002.

J: Ya, setuju.

S: Selaku I.O., kamu ada baca percakapan tertuduh tersebut.

H J: Ya, ada.

S: Setuju di dalam percakapan beliau, tertuduh ada kata yang ganja dijumpai dari dalam kereta.

J: Saya tak ingat.

I

S: Boleh kamu rujuk percakapan tertuduh tersebut.

J: Ya, setelah membacanya sekarang saya sahkan tertuduh ada mengatakan sedemikian di dalam percakapannya.

[26] We must highlight that although the cautioned statement was not marked as an exhibit by either the prosecution or the defence, yet it was alluded to by SP7 in cross-examination. A

[27] We have perused through the written grounds of judgment of the learned High Court Judge and we detected that His Lordship did not consider the defence raised by the appellant in his cautioned statement as alluded to by SP7 in his cross-examination. Such failure constituted an appealable error. A classic example would be the case of *Er Ah Kiat v. PP* [1965] 1 LNS 37; [1965] 2 MLJ 238 where the trial judge did not consider the defence and the Federal Court allowed the appeal and set aside the conviction and sentence. B C

[28] Here, the learned High Court Judge did not judicially appreciate the defence of the appellant as stated in his cautioned statement. In our judgment, it was the bounden duty of the learned High Court Judge to consider that defence. Such failure amounted to a non-direction by His Lordship. And that non-direction amounts to a misdirection. In *Joseph Bundy* [1910] 5 Cr App R 270, Pickford J held that a misdirection as to the evidence of identification of the defendant may be a ground for quashing a conviction. D E

[29] A weak or an unreasonable defence must be considered and appreciated judicially. It should not be brushed aside without giving it due consideration. This is the law and it is entrenched in the following authorities: F

(a) *Ganapathy Rengasamy v. PP* [1998] 2 CLJ 1; [1998] 2 MLJ 577;

(b) *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209, FC; G

(c) *Chan Chor Shuh v. PP* [2003] 1 CLJ 501; [2003] 2 MLJ 26, CA; and

(d) *PP lwn. Muhd Zulkifli Abd Ghani & Satu Lagi* [2011] 2 CLJ 772; [2003] 5 MLJ 337. H

[30] The trial judge in *R v. Emmanuel* [1998] Crim LR 347 refused to put to the jury the weak defence advanced by the appellant. The appellate court allowed the appeal and Their I

A Lordships held that no matter how weak the defence was, it must be left to the jury to consider and decide. In all the circumstances, the conviction was held to be unsafe and it was quashed.

[31] SD2 corroborated the appellant's testimony in court when B he gave evidence to the effect that the appellant was not holding anything when he got out of the said motorcar. The version advanced by SD2 was contrary to and in sharp contrast to the testimonies of SP2 and SP4. The learned High Court Judge disbelieved the evidence of SD2 and His Lordship had this to say C about this witness at p. 213 of the appeal record at jilid 2:

> SD2 (Lahmat bin Mustaffa) yang dipanggil untuk tertuduh mengesahkan keterangannya adalah didapati seorang saksi yang tiba-tiba muncul atau disebut pertama kalinya di dalam pembelaan. Nama ini tidak pernah disebut atau dicadangkan kepada Pegawai D Penyiasat semasa beliau memberi keterangan. Kredibiliti SD2 ini juga adalah didapati agak meragukan apabila beliau mula masuk ke Malaysia secara haram pada 3.9.2002 sedangkan pasport beliau menunjukkan satu-satunya cop masuk beliau ke Malaysia adalah 9.10.2009 iaitu selepas tarikh kejadian. Walaupun begitu keterangan SD2 ini jelas tidak membantu tertuduh apabila beliau E mengesahkan keterangan Chief Inspektor Chia Aik Chin (SP2) bahawa tertuduh sememangnya bergelut dengan Chief Inspektor Chia sebelum ditangkap bercanggah dengan keterangan tertuduh yang menafikan pergelutan tersebut.

F **[32]** It is apparent that the learned High Court Judge disbelieved the evidence of SD2 because the latter's evidence was not put to the prosecution's witnesses – be it SP2, SP4 or SP7. However, His Lordship chose only to believe SD2's evidence when it confirmed the version of SP2 that the appellant struggled with G SP2 before the appellant was arrested. To be fair to the learned High Court Judge, the appellant agreed under cross-examination that he did not tell the police about SD2 at all. At this juncture, we recalled to mind the case of *Mohan Singh Lachman Singh v. PP* [2002] 3 CLJ 293; [2002] 3 MLJ 291, where Gopal Sri Ram JCA H (as he then was) aptly said at p. 297 of the report:

> The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting I to a purported failure on the part of the defence to put specific questions relevant to its case. Such gaps must be filled by the prosecution itself: *Abdullah Zawawi v. PP* [1985] 2 MLJ 16. That has always been the law. It is still the law.

[33] There is a short passage appearing in the judgment of Edgar Joseph Jr FCJ in *Alcontara Ambross Anthony v. PP* (*supra*) at p. 718 (CLJ); p. 218 (MLJ), that merits reproduction. It is this:

> However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

[34] Yong Pung How CJ (Singapore) in *Liza Ismail v. PP* [1997] 2 SLR 454 held that notwithstanding the non cross-examination, it was still incumbent on the trial judge to determine the cogency and weight of the unchallenged testimony.

[35] Be that as it may, based on the testimonies of SP2 and SP4 with that of the appellant and SD2, we have the nagging doubts as to the location of the drugs. Were the drugs in the plastic bag (exh. "P10") carried by the appellant in his right hand or were the drugs in the plastic bag (exh. "P10") recovered by the police from the backseat of the said motorcar. This is where the role of "Yana" plays a prominent part. "Yana" was a passenger of the said motorcar. She sat in the front passenger seat and she remained seated there and witnessed what went on. Under cross-examination, SP7 confirmed that "Yana" was arrested whilst she was still inside the said motorcar. In this context, the cross-examination of SP7 at p. 108 of the appeal record at jilid 1 should be reproduced:

> S: Benarkah Yana juga ditangkap di dalam kereta tersebut.
>
> J: Saya tak ingat.
>
> S: (Setelah melihat kertas siasatan). Mengikut laporan polis yang dibuat, Yana ditangkap di dalam kereta.
>
> J: Ya.

[36] "Yana" was certainly a key witness. She saw the whole episode while seated as a front passenger in the said motorcar. She was not called as a witness by the prosecution and her statement was not tendered and marked as an exhibit by the prosecution. In our judgment, the prosecution should have tendered the statement of "Yana" to negate all the negative inferences that arose as a result of the cross-examination of the prosecution's witnesses.

[37] It was SP7 who testified that "Yana" was charged for an offence under s. 6(1)(c) of the Immigration Act 1959 for not being in possession of a valid travel document. But SP7 did not know the outcome of the court case. However, SP7 confirmed that "Yana" was not charged for trafficking under s. 39B of the DDA.

[38] SP7 was not particularly concerned about the whereabouts of "Yana" after she was sentenced for an immigration offence by the court. In fact, SP7 did not make any attempt to trace "Yana" at all. In his examination-in-chief, SP7 had this to say about "Yana" at p. 106 of the appeal record at jilid 1:

> Seorang lagi tangkapan bernama Yana binti Abdullah. Selepas beliau dituduh dan dijatuhkan hukuman di bawah s. 6(1)(c) Akta Imigresen, saya tidak lagi tahu apa yang terjadi kepada beliau. Saya tidak ada cuba mengesan beliau.

[39] SP7 adopted a non-chalant attitude towards "Yana". He neither seized "Yana's" passport nor secured the marriage certificate of "Yana" or any other document to show that "Yana" was married to the appellant. He did not record in his investigation diary ("ID"), the number of days that "Yana" was detained. However, he recorded in the remand ID that was enclosed in the investigation paper that "Yana" was remanded for 13 days from 12 September 2002 to 25 September 2002. All these facts can be seen in the cross-examination of SP7 at p. 107 of the appeal record at jilid 1.

[40] Of crucial importance, SP7 agreed that he recorded the statement of "Yana" under s. 112 of the Criminal Procedure Code ("CPC"). At p. 108 of the appeal record at jilid 1, this was what SP7 said in cross-examination:

> S: Adakah kamu mengambil percakapan daripada Yana ini.
>
> J: Ya, ada di bawah seksyen 112 CPC.

[41] Under cross-examination, SP7 admitted that he did not take any action to ensure "Yana's" attendance as a witness in this case. Although SP7 investigated as to how "Yana" entered Malaysia, he admitted that he had forgotten as to how "Yana" had entered Malaysia. However, SP7 agreed that if "Yana" had no valid travel document, she could not leave the country through the designated exit point. All these facts are taken from the cross-examination of SP7 at p. 109 of the appeal record at jilid 1.

[42] It is apparent that the prosecution failed to secure the attendance of "Yana" in court. And the failure on the part of the prosecution to tender "Yana's" statement recorded under s. 112 of the CPC crippled the prosecution's case. "Yana" was not even offered to the defence at the close of the prosecution's case.

[43] It is purely a question of fact whether a particular witness is material or otherwise. What is of importance is to consider whether the material witness is "essential to the unfolding of the narratives on which the prosecution case is based" (to borrow the words of Lord Roche in *Seneviratne v. R* [1936] 3 All ER 36, PC, at p. 49) or to borrow the words of Mohamed Azmi SCJ in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, SC, at p. 494, that witness must be "an important and material witness to the case". And if the answer is in the affirmative, then the witness is said to be material. In the context of the present appeal, "Yana" was an indispensable prosecution witness that would tie up the loose ends, so to speak, and drive home the charge against the appellant beyond reasonable doubt.

[44] *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433, is a Federal Court case. It concerned an informer who was found by the Federal Court to have somehow assumed the role of an agent provocateur but was neither called by the prosecution nor offered to the defence at the close of the prosecution's case. That was considered fatal by the Federal Court and in setting aside the conviction, Edgar Joseph Jr FCJ writing for the Federal Court laid down the law at p. 440 in these lucid terms:

> Having said that, it is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see, eg, *Adel Muhammed el Dabbah v. A-G of Palestine* [1944] AC 156 at pp. 167-169; [1944] 2 All ER 139 at pp 143-144), the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation – which is nothing less than a statutory duty – the accused must be acquitted.

[45] There is no duty on the part of the appellant to call "Yana" as his witness. In fact, there is no duty on the appellant to call any evidence at all. The appellant is at liberty to adopt one course of action and not the other. Indeed it is the appellant's choice and whatever choice he makes, no unfavourable inference should be drawn against him (*Goh Ah Yew v. PP* [1948] 1 LNS 13; [1949] MLJ 150; *Abu Bakar v. Regina* [1963] 1 LNS 4; [1963] MLJ 288; and *Tan Foo Su v. PP* [1967] 1 LNS 179; [1967] 2 MLJ 19). "Yana" as a material witness to the unfolding of the factual matrix of the case can never be doubted. She held the trump card, so to speak, to determine as to the location of the plastic bag (exh. "P10") containing the drugs at the material time when SP2 confronted the appellant. That doubt could have been resolved if the prosecution had called "Yana" as a witness or alternatively, if the statement of "Yana" recorded under s. 112 of the CPC was tendered.

[46] In *Ang Kian Chai v. PP & Another Appeal* [2012] 1 LNS 389; [2012] 4 MLRA 456, CA, the prosecution did not call Chen Jing as a witness and her s. 112 statement was also not tendered. And Abdul Malik bin Ishak, JCA writing the judgment of the Court of Appeal had this to say at p. 463 of the report:

> (27) Learned counsel for the appellant implored this Court to invoke section 114(g) of the Evidence Act 1950 not because of the failure of the prosecution to produce Chen Jing in person but rather because of the failure of the prosecution to tender the section 112 statement of Chen Jing bearing in mind that the prosecution had in its possession the section 112 statement of Chen Jing. We agree with the submission of learned counsel and towards this end it is opportune to refer to the case of *Munusamy Vengadasalam v. PP* [1987] 1 MLJ 492, SC. There the Court said that the withholding of a material document and its non production would be fatal. Likewise here, the withholding of section 112 statement of Chen Jing must be held to be detrimental to the case for the prosecution because that statement was a material document that would assist the Court to arrive at a just decision.

[47] Just like Chen Jing in *Ang Kian Chai v. PP & Another Appeal* (*supra*), "Yana" was also a material witness and her s. 112 statement was a material document that would shed light as to the location of the plastic bag (exh. "P10") containing the drugs at

the material time. To compound the matter further, the non-production of "Yana", an important and material witness to the case, gave rise to the adverse inference that if she had been called, her evidence would be unfavourable to the prosecution and that being the case, the presumption in s. 114(g) of the Evidence Act 1950 must be invoked against the prosecution (*PP v. Mohd Fahmi Hamzah* [2002] 1 LNS 59; [2002] 6 MLJ 340; and *PP v. Nordin Awang* [2000] 1 LNS 288; [2001] 1 AMR 855).

[48] For these varied reasons, we decided the first issue in favour of the appellant. Without "Yana", the presumption under s. 114(g) of the Evidence Act 1950 must be vigorously applied against the prosecution.

The Second Issue

[49] We must now direct our attention to the second issue. It concerned the gaps in the handling of the exhibits by the failure on the part of the prosecution to call the store keeper.

[50] It was argued that there were doubts as to the identity of the exhibits. SP2 testified that he brought back the cannabis seized in this case – referring to Kampung Jawa, and the cannabis seized from the Taman Berjaya in his personal car. The exhibits were unmarked throughout the journey from Kampung Jawa (the place where the appellant and "Yana" were arrested) to Taman Berjaya (the subsequent arrest of three male Indonesians) and then to IPK Selangor. The markings and labellings of the exhibits pertaining to the Kampung Jawa were done in the presence of the appellant and "Yana" when they reached IPK Selangor. Hence, it was submitted that there is a possibility of a mix up between both the exhibits from Kampung Jawa and Taman Berjaya.

[51] Our attention was drawn to the evidence of SP2 at the cross-examination stage as seen at p. 56 of the appeal record at jilid 1 and the exchange went like this:

S: Kamu kata untuk kes Tertuduh hari ini, kamu bawa balik barang kes yang dirampas dalam kereta kamu sendiri.

J: Ya.

S: Oleh itu setuju bahawa barang kes rampasan dari Taman Berjaya Klang dibawa balik ke IPK bersama barang kes untuk kes Tertuduh hari ini dalam satu kereta yang sama iaitu kereta kamu sendiri.

J: Ya.

[52] In this context, it is germane to refer to the speech of Abdul Hamid Omar CJ (Malaya) (later the Lord President of the Supreme Court) in *Teoh Hoe Chye v. PP & Another Case* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386. There, His Lordship aptly said at p. 389 of the report:

> We would observe at this point that the law is clear in that 'it is unnecessary to call evidence to ensure there is no break in the chain of evidence' (*Su Ah Ping v. PP* [1980] 1 MLJ 75). But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution's case. In the instant case there was such a failure.

[53] And because of these doubts as to the identity of the exhibits and relying on *Teoh Hoe Chye*'s case, it was submitted that the prosecution should have called the storekeeper. It was further submitted that no evidence as to what the storekeeper did with the exhibits was led and how long he kept the exhibits was not made known at all. According to the defence, the store register book was not even tendered. Finally, it was submitted that there was a possibility that the exhibits brought to the High Court during the trial may have been those cannabis seized from the Taman Berjaya house.

[54] By way of a response, the learned Deputy Public Prosecutor pointed out that the issue of mixed drugs was neither raised nor put to the prosecution's witnesses. And that throughout the trial, SP2 made it clear that the cannabis found in Taman Berjaya was in relation to a different case not related to the Kampung Jawa episode.

[55] In his examination-in-chief, SP2 testified that the plastic bag (exh. "P10") containing the three compressed dried vegetable matters suspected to be cannabis was under his control throughout until it was handed over to SP7 – the investigating officer. SP2 also testified that he held and carried the exhibits and did not pass them to anyone to hold until he handed them to SP7 himself. In its original text, this was what SP2 said in his examination-in-chief as seen at pp. 14 to 15 of the appeal record at jilid 1:

Sepanjang masa barang kes itu iaitu beg plastik yang mengandungi 3 ketulan mampat (disyaki ganja) di bawah kawalan saya sehingga barang itu diserahkan kepada I.O. Sepanjang masa barang kes saya yang membawanya dan tidak menyerahkan kepada orang lain untuk memegang selain I.O.

[56] SP2 also testified in his examination-in-chief that he recognised the exhibits that he seized by looking at the markings "A", "B", and "B1-B3", dated 11 September 2002 and his signatures on the exhibits thereto. SP2 also testified that the markings were made by him in the presence of the appellant and "Yana". In its original text, this was what SP2 said at p. 37 of the appeal record at jilid 1:

Saya masih ingat tandaan-tandaan yang saya buat ke atas barang kes tersebut iaitu saya menandakan 'A' pada satu beg plastik jenama 'Rags Solid Station' dan 'B' pada bungkusan surat khabar Berita Harian bertarikh 20 Ogos 2002 dan saya tandakan 'B1' hingga 'B3' pada masing-masing tiga ketulan mampat yang disyaki ganja yang dibaluti kertas timah dan plastik lutsinar. Saya tandakan 'C' kepada dua anak kunci bersama satu penggera untuk kereta Wira tersebut. Di atas kesemua barang-barang kes ini saya juga turunkan tandatangan saya dan tuliskan tarikh 11 September 2002. Semasa saya membuat penandaan-penandaan ini, kedua-dua orang yang ditangkap iaitu OKT dan perempuan bernama Yana tersebut berada di hadapan saya.

[57] The markings of the exhibits by SP2 as identified by him and the signatures of SP2 on the exhibits together with the dates written thereto on the exhibits showed that those were the exhibits in relation to the charge before the learned High Court Judge and before us on appeal. All these markings showed that the exhibits were the same exhibits seized from the scene of the crime at Kampung Jawa on 11 September 2002 and analysed by SP3 and brought to the High Court before the learned judge for trial. At this juncture, we refer to the case of *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551, CA, at pp. 568 to 569, and we gratefully adopt what Abdul Hamid bin Mohamed JCA (later Chief Justice) said in that case:

First, by way of a general observation, I am of the view that, in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc. and it is in respect of that substance

A that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to
B give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that
C same substance that the accused is charged with.

The proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap', does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of
D evidence. But, if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the
E circumstances of the case, may not give rise to any doubt of that fact.

[58] In our judgment, the exhibits seized from the scene of the crime at Kampung Jawa on 11 September 2002 were the same exhibits that were analysed by SP3 and brought to the High
F Court and that being the case, there was no necessity to call the storekeeper. Consequently, we agreed with the learned Deputy Public Prosecutor that there was no merit in regard to the second issue. We decided the second issue in favour of the prosecution.

G **Conclusion**

[59] Since we agreed that the first issue favoured the appellant, we allowed the appeal. The conviction and the sentence of death imposed by the High Court at Shah Alam were set aside. The
H appellant was acquitted and discharged forthwith. We restored freedom to the appellant.

I